

FILED

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MARIN COUNTY SUPERIOR COURT
By: J. Chen, Deputy

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6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 FOR THE COUNTY OF MARIN

9 UNLIMITED CIVIL JURISDICTION

10
11 SUSAN DAVIA,

12 Plaintiff,

13 v.

14 DRIVE MEDICAL, INC., DRIVE DEVILBISS
15 HEALTHCARE, INC., MEDICAL DEPOT,
INC. and DOES 1-150,

16 Defendants.
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Case No. CIV 2002748

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

(Cal. Health & Safety Code § 25249.6 et seq.)

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1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff SUSAN DAVIA, in the
3 public interest of the citizens of the State of California, to enforce the People's right to be informed
4 of the presence of di(2-ethylhexyl)phthalate ("DEHP"), di-n-butyl phthalate ("DBP"), diisononyl
5 phthalate ("DINP") and di-isodecyl phthalate ("DIDP"), toxic chemicals found in certain Drive
6 Medical home health products manufactured, distributed and/or otherwise sold by defendants in
7 California.

8 2. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
9 California Health & Safety Code Section 25249.6 *et seq.* ("Proposition 65"), "No person in the course
10 of doing business shall knowingly and intentionally expose any individual to a chemical known to
11 the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning
12 to such individual. . . ." (*Cal. Health & Safety Code* § 25249.6.)

13 3. On October 4, 2003, the State listed DEHP as a chemical known to reproductive
14 toxicity. DEHP became subject to the statutory "clear and reasonable" warning requirement on
15 October 4, 2014. On December 2, 2005, the State listed DBP as a chemical known to reproductive
16 toxicity. DBP became subject to the statutory "clear and reasonable" warning requirement on
17 December 2, 2006. On December 20, 2013, the State listed DINP as a chemical known to cause
18 cancer. DINP became subject to the statutory "clear and reasonable" warning requirement on
19 December 20, 2014. On April 20, 2007, the state listed DIDP as a chemical known to cause
20 developmental toxicity. DIDP became subject to the statutory "clear and reasonable" warning
21 requirement on April 20, 2008. (27 CCR § 27001(c); *Cal. Health & Safety Code* § 25249.8.)

22 4. DEHP, DBP, DIDP and DINP shall hereinafter be collectively referred to as "LISTED
23 CHEMICAL."

24 5. Significant levels of the LISTED CHEMICAL have been discovered in or on the
25 vinyl/PVC components of Drive medical home health products manufactured with vinyl
26 components that defendants design, manufacture, distribute, and/or offer for sale to consumers
27 throughout the State of California including, as example, *but not limited to*, Drive Medical Vinyl
28 Mesh Bather Pouch, Item 10267-1, 822383232065, Drive Oxygen Cylinder Shoulder Bag, Item 18102

1 (822383104263) and Drive Cervical Traction Set, Item #13004 (822383102986). All such Drive home
2 health care products including vinyl/PVC materials containing any LISTED CHEMICAL shall
3 hereinafter be referred to as the "PRODUCTS."

4 6. Defendants' failure to warn consumers and/or other individuals in the State of
5 California about their exposures to the LISTED CHEMICAL in conjunction with defendants' sale of
6 the PRODUCTS is a violation of Proposition 65.

7 7. For defendants' violations of Proposition 65, plaintiff seeks preliminary and
8 permanent injunctive relief to compel defendants to provide employees handling the PRODUCTS
9 and purchasers or users of the PRODUCTS with the required warning regarding the health hazards
10 of the LISTED CHEMICAL. (*Cal. Health & Safety Code § 25249.7(a).*)

11 8. Plaintiff also seeks civil penalties against defendants for their violations of
12 Proposition 65, as provided for by California Health & Safety Code Section 25249.7(b).

13 **PARTIES**

14 9. Plaintiff SUSAN DAVIA is a citizen of the State of California who is dedicated to
15 protecting the health of California citizens through the elimination or reduction of toxic exposures
16 from consumer products, and brings this action in the public interest pursuant to California Health
17 & Safety Code Section 25249.7.

18 10. Based upon publicly available information, plaintiff is informed and believes, and
19 thereupon alleges, that each defendant DRIVE DEVILBISS HEALTHCARE, INC., DRIVE
20 MEDICAL, INC. and MEDICAL DEPOT, INC. is a person doing business within the meaning
21 of California Health & Safety Code Section 25249.11.

22 11. Based upon publicly available information, plaintiff is informed and believes, and
23 thereupon alleges, that each defendant DRIVE DEVILBISS HEALTHCARE, INC., DRIVE
24 MEDICAL, INC. and MEDICAL DEPOT, INC. is legally responsible for the design,
25 manufacture, distribution, and/or offer of the PRODUCTS for sale or use in the State of California
26 or implies by its conduct that it designs, manufactures, distributes, and/or offers the PRODUCTS
27 for sale or use in the State of California.
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12. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons doing business within the meaning of California Health & Safety Code Section 25249.11.

13. MANUFACTURER DEFENDANTS engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they engage in the process of research, testing, designing, assembling, fabricating, and/or manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

14. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons doing business within the meaning of California Health & Safety Code Section 25249.11.

15. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or transport one or more of the PRODUCTS to individuals, businesses or retailers for sale or use in the State of California.

16. Defendants DOES 101-150 ("RETAIL DEFENDANTS") are each persons doing business within the meaning of California Health & Safety Code Section 25249.11.

17. RETAIL DEFENDANTS offer of the PRODUCTS for sale to individuals in the State of California.

18. At this time, the true names of Defendants DOES 1 through 150, inclusive, are unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to Code of Civil Procedure Section 474. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences herein alleged. When ascertained, their true names shall be reflected in an amended complaint.

19. DRIVE DEVILBISS HEALTHCARE, INC., DRIVE MEDICAL, INC., MEDICAL DEPOT, INC., MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to hereinafter as “DEFENDANTS”.

VENUE AND JURISDICTION

20. Venue is proper in the Marin County Superior Court, pursuant to Code of Civil Procedure Sections 394, 395, and 395.5, because this Court is a court of competent jurisdiction, because one or more instances of wrongful conduct occurred, and continues to occur, in the County

1 of Marin and/or because DEFENDANTS conducted, and continue to conduct, business in this
2 County with respect to the PRODUCTS.

3 21. The California Superior Court has jurisdiction over this action pursuant to California
4 Constitution Article VI, Section 10, which grants the Superior Court "original jurisdiction in all
5 causes except those given by statute to other trial courts." The statute under which this action is
6 brought does not specify any other basis of subject matter jurisdiction.

7 22. The California Superior Court has jurisdiction over DEFENDANTS based on
8 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or
9 association that either are citizens of the State of California, have sufficient minimum contacts in the
10 State of California, or otherwise purposefully avail themselves of the California market.
11 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California
12 courts consistent with traditional notions of fair play and substantial justice.

13 **FIRST CAUSE OF ACTION**
14 **(Violation of Proposition 65 - Against All Defendants)**

15 23. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein,
16 Paragraphs 1 through 22, inclusive.

17 24. In passing Proposition 65, the citizens of the State of California expressed their intent
18 through the preamble to the Safe Drinking Water and Toxic Enforcement Act of 1986 that they must
19 be "informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
20 harm."

21 25. Proposition 65 states, "[n]o person in the course of doing business shall knowingly
22 and intentionally expose any individual to a chemical known to the state to cause cancer or
23 reproductive toxicity without first giving clear and reasonable warning to such individual"
24 Health & Safety Code § 25249.6.

25 26. On July 10, 2020, a valid and compliant Proposition 65 60-Day Notice of Violation
26 ("60-Day Notice"), together with a valid, requisite Certificate of Merit, were served on DRIVE
27 DEVILBISS HEALTHCARE, INC., DRIVE MEDICAL, INC., MEDICAL DEPOT, INC. and
28 various public enforcement agencies stating that as a result of the DEFENDANTS' manufacture,

1 distribution and sales of the PRODUCTS, purchasers and users in the State of California are being
2 exposed to DINP and DIDP from the reasonably foreseeable uses of certain PRODUCTS, without
3 the individual purchasers and users first having been provided with a “clear and reasonable
4 warning” regarding such toxic exposures.

5 27. On January 29, 2021, a valid and compliant Proposition 65 Supplemental 60-Day
6 Notice of Violation (“Supplemental 60-Day Notice”), together with a valid, requisite Certificate of
7 Merit, were served on DRIVE DEVILBISS HEALTHCARE, INC., DRIVE MEDICAL, INC.,
8 MEDICAL DEPOT, INC. and various public enforcement agencies stating that as a result of the
9 DEFENDANTS’ manufacture, distribution and sales of the PRODUCTS, purchasers and users in
10 the State of California are being exposed to DEHP and DBP from the reasonably foreseeable uses of
11 certain PRODUCTS, without the individual purchasers and users first having been provided with a
12 “clear and reasonable warning” regarding such toxic exposures.

13 28. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
14 the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6 and
15 plaintiff is informed and believes that DEFENDANTS’ manufacture, distribution, and/or offering
16 of the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6
17 has continued to occur beyond DEFENDANTS’ receipt of plaintiff’s 60-Day Notice. Plaintiff further
18 alleges and believes that such violations will continue to occur into the future.

19 29. After receipt of the claims asserted in the 60-Day Notice and Supplemental 60-Day
20 Notice, the appropriate public enforcement agencies have failed to commence and diligently
21 prosecute a cause of action against DEFENDANTS under Proposition 65.

22 30. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
23 California by DEFENDANTS, contain one or more LISTED CHEMICAL.

24 31. DEFENDANTS knew or should have known that the PRODUCTS contained such
25 LISTED CHEMICAL.

26 32. A LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
27 expose individuals to the LISTED CHEMICAL, as such exposure is defined by 27 CCR Section
28 25602(b), through dermal contact and/or ingestion and/or inhalation during or as a consequence of

1 the packing, shipping, unpacking, display and daily organization and movement of PRODUCTS as
2 well as the reasonably foreseeable use of the PRODUCTS.

3 33. DEFENDANTS knew or should have known that the packing, shipping, unpacking,
4 display and daily organization and movement of PRODUCTS as well as the reasonably foreseeable
5 use of the PRODUCTS exposes individuals to a LISTED CHEMICAL through dermal contact
6 and/or ingestion and/or inhalation.

7 34. DEFENDANTS' participation in the manufacture, distribution and/or offer for sale
8 or use of PRODUCTS to individuals in the State of California was deliberate and non-accidental.

9 35. DEFENDANTS failed to provide a "clear and reasonable warning" to those
10 consumers and/or other individuals in the State of California who were or who could become
11 exposed to a LISTED CHEMICAL during the reasonably foreseeable retail receipt, display and
12 organization of PRODUCTS as well as the reasonably foreseeable use of the PRODUCTS.

13 36. Contrary to the express policy and statutory prohibition of Proposition 65,
14 employees and individuals exposed to a LISTED CHEMICAL through dermal contact and/or
15 ingestion and/or inhalation resulting from the reasonably foreseeable use of the PRODUCTS, sold
16 by DEFENDANTS without a "clear and reasonable warning", have suffered, and continue to suffer,
17 irreparable harm, for which harm they have no other plain, speedy or adequate remedy at law.

18 37. As a consequence of the above-described acts, DEFENDANTS are liable for a
19 maximum civil penalty of \$2,500 per day for each violation of Proposition 65 pursuant to California
20 Health & Safety Code Section 25249.7(b).

21 38. As a consequence of the above-described acts, California Health & Safety Code
22 Section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
23 DEFENDANTS.

24 **PRAYER FOR RELIEF**

25 Wherefore, plaintiff prays for judgment against DEFENDANTS, and each of them, as
26 follows:
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1 1. That the Court, pursuant to California Health & Safety Code Section 25249.7(b),
2 assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation
3 alleged herein;

4 2. That the Court, pursuant to California Health & Safety Code Section 25249.7(a),
5 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering
6 the PRODUCTS for sale or use in California, without providing "clear and reasonable warnings" as
7 defined by 27 CCR Section 25601, as to the harms associated with exposures to the LISTED
8 CHEMICAL;

9 3. That the Court grant plaintiff her reasonable attorneys' fees and costs of suit; and

10 4. That the Court grant such other and further relief as may be just and proper.

11 Dated: April 16, 2021

Respectfully submitted,

SHEFFER LAW FIRM

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14 By: 

Gregory M. Sheffer
Attorneys for Plaintiff
SUSAN DAVIA